Appendix 5B

Training Memo – The Implications of Forfeiture by Wrongdoing for Prosecution of Domestic Abuse Cases

United States Supreme Court Cases

Both the *Crawford* and *Davis* decisions recognize the doctrine of forfeiture by wrongdoing. If the defendant obtains the absence of the witness by wrongdoing, the defendant forfeits his constitutional right to confront the witness and his constitutional objection to hearsay statements of the witness. In domestic violence cases, the victim/witness is especially vulnerable to threats and intimidation. Studies suggest that over half of defendants in domestic violence cases issue threats or retaliate against accusers.[1] The *Crawford* and *Davis* decisions, by making the live testimony of the victim at trial more important than it had been, also increased the significance of the doctrine of forfeiture by wrongdoing. Vigorous pursuit of the forfeiture doctrine will lead to more successful prosecutions and discourage defendants from attempting to intimidate victims.

The U.S. Supreme Court held in *Giles v. California*, 128 S. Ct. 2678 (2008), that unconfronted testimony is not admissible under the forfeiture doctrine without a showing that the defendant intended to prevent a witness from testifying. The Court noted that acts of domestic violence are often intended to dissuade a victim from resorting to outside help, and that a defendant's prior abuse or threats of abuse, intended to dissuade a victim from resorting to outside help, would be highly relevant to determining the intent of a defendant's subsequent act causing the witness's absence, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Minnesota Supreme Court Cases—Evaluating the Defendant's Actions

[1] *See* State v. Mechling, 633 S.E. 2d311, 324 (W.VA. 2006). *See also* Randall Fritzler & Lenore Simon, *Creating a Domestic Violence Court: Combat in the Trenches,* 37 Ct. Rev. 28, 33 (2000) (indicating that research shows that batterers threaten retaliatory violence in as many as half of all cases and 30 per cent of batterers assault their victims again during the predisposition phase).

Whether a defendant has acted to intimidate a witness with the intent of procuring her/his absence is a fact-specific determination. The following cases provide guidance regarding the need for the state to demonstrate that the surrounding circumstances that show that the defendant's actions were intended to procure the unavailability of the witness.

In two companion cases, an accomplice to murder gave statements at her arrest and at her own trial but then refused to testify at the defendant's trial, stating that she feared she or her child would be harmed. The Minnesota Supreme Court found that the defendant forfeited his right to confrontation even though there was no evidence showing that the defendant threatened the accomplice between the time of her grand jury testimony and the time of the trial. The court cited the fact that the defendant had repeatedly threatened her to induce her to effectuate his murder plan, sent a man who had beaten her who told her to follow defendant's orders, and that the woman who defendant planned to murder was a potential witness, *See State v. Olson*, 291 N.W.2d 203 (Minn. 1980), and *State v. Black*, 291 N.W.2d 208 (1980).

A year later the Minnesota Supreme Court found that a claim of forfeiture would not be upheld when the "state did not show that there was any direct or indirect evidence indicating that defendant's conduct had caused the Fischer's [the witnesses] silence. . . ." *State v. Hansen*, 312 N.W.2d 96, 105 (1981). In *Hansen*, the court found that while the witnesses may have feared they would be harmed, there was no evidence that the defendant or anyone acting on his behalf had intimidated the witnesses by general or specific threats.

In a later case, the Minnesota Supreme Court upheld a finding of forfeiture in which both the witness and the defendant were members of the same gang. *State v. Byers*, 570 N.W.2d 487 (Minn. 1997). The court in this case found that the gang "conspiracy of silence" implicitly included the threat of violence against any member who broke the agreement. The conspiracy of silence in conjunction with the defendant's wearing of gang colors and the entry into the courtroom of several other persons attired in gang colors when the witness was called to testify was sufficient to find that the defendant had waived his sixth amendment rights to confront the witness. The court stated that "if you can intimidate a witness in open court with impunity there is no need to engage in violence or threats of violence. . . .[A] witness' absence and silence may be procured by agreement as effectively as it can be by violence or threats of violence." *Byers* at 495.

It is clear from these cases that the court is looking at all of the circumstances in order to determine if the defendant, by his actions, forfeited his right to confront a witness. Therefore, prosecutors need to undertake a similar evaluative process in domestic violence cases.

Use in Domestic Violence Cases

For the forfeiture doctrine to be useful in domestic violence cases, it must be understood within the context of the battering relationship. Courts must be educated to recognize that the domestic violence case may not follow the typical witness tampering scenario in which a crime is committed, and later the defendant engages in specific acts that cause the witness's unavailability (e.g., the phone call from jail threatening to kill the witness if the witness testifies at trial). While such threats may occur in battering relationships, a range of other behaviors must be also considered in determining if the defendant's actions caused the unavailability of the victim or witness in a domestic violence case. The typical time frame of a criminal act, arrest, and intimidating or threatening behavior toward the witness may not be present in the same time sequence in domestic violence cases. Threats directed at the victim, her children or other family members may have occurred prior to the current incident as a means of controlling her behavior. The patterned nature of domestic violence means that a broader time frame should be considered by the court.

The pattern of behavior present in domestic violence cases also means that the court should be open in evaluating what it considers to be misconduct that causes unavailability. It may be extremely challenging to separate out those actions that would typically be viewed as "witness tampering" from the violent incident that resulted in the arrest. Because a battering relationship is likely to consist of a series of abusive actions, it is difficult to divide the defendant's prior criminal act from the act of intimidating the victim or witness. In battering relationships, additional acts to intimidate the victim or witness are often not necessary. The acts of domestic violence are sufficient to obtain the victim's unavailability. However, pursuant to the *Giles* case, the defendant must also have intended that result.

In domestic violence cases where there has been a long history of violence, the possibility of forfeiture should be considered when the victim is unavailable. As

with other preliminary evidentiary questions, hearsay should be admissible to prove forfeiture and the standard of proof should be preponderance of the evidence. [2]

Recommendations for Practice

The constraints placed on the admissibility of evidence as a result of the *Crawford* and *Davis* cases mean that prosecutors must be creative in developing new tools and modifying existing ones to enhance the likelihood of successfully prosecuting domestic assault cases. In light of the critical role the forfeiture by wrongdoing doctrine plays in prosecution as a result of the *Crawford* and *Davis* decisions, prosecutor's offices should consider directing resources to assist the actions of collaborating agencies and to engage in the following measures:

- ❒ Request review of recorded post-arrest defendant phone calls from jail or prison.
- ❒ Train police, when responding to a domestic violence case, to ask specifically whether the defendant has ever made statements directed toward the victim, her children and other family members threatening harm if the victim contacts the police or participates in the prosecution process.
- ❒ Train police and investigators to inquire about and gather voice mails, emails, text messages, either prior- or post-arrest sent by the defendant that may include threats.
- ❒ Where appropriate, inquire of advocates working with the victim if statements by the defendant have been made threatening the victim or her family.
- ❒ In collaboration with the police and advocates, institute post-arrest procedures to follow-up with the victim to inquire about post-arrest contact between the defendant and victim.

[2] *See* Lininger, *Reconceptualizing Confrontation After Davis,* 85 Tex. L. Rev. 271 (2006).